

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION  
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW  
ON THE  
FRENCH COMPETITION AUTHORITY'S DRAFT NOTICE ON FINES**

**February 16, 2011**

*The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.*

**INTRODUCTION**

The Section of Antitrust Law (“Antitrust Section”) and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) welcome the Competition Authority’s consultation on its draft Notice on Fining for infringements of competition law (the “draft Notice”)<sup>1</sup> and applaud the Competition Authority for providing business and consumer organisations with the opportunity to provide comments on the draft Notice.

The Sections recognize that competition laws are a critical part of a healthy economy and are critical to economic growth. In this respect, fines and sanctions play an important role in deterring violation of the competition laws and promoting compliance. At the same time, fines and sanctions must be fair and proportionate, as otherwise there is a risk that they could hinder economic growth. It is important therefore that fines and sanctions are set in accordance with sound principles that are transparent and balanced. The Sections believe that the draft Notice will go a long way to ensuring the appropriate balance. The Sections hope to assist the Competition Authority in meeting this objective. In these observations, the Sections address the following specific issues:

- (i) Experience in the United States in setting fines
- (ii) Affected sales and duration
- (iii) Harm to the economy
- (iv) Aggravating factors
- (v) Mitigating factors

**1. THE EXPERIENCE IN THE UNITED STATES**

The Sections believe that a clearly defined and transparent process is essential to achieve fairness and to provide effective deterrence. As a useful – and, hopefully, helpful –framework, these observations set out some experience that has guided and focused sentencing policy in the United States for almost twenty years.

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<sup>1</sup> The Sections have previously commented on the fining provisions of the Canadian Competition Bureau and the U.S. Department of Justice, Antitrust Division and these comments reiterate many of the principles discussed in those comments. See Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases Issued by the Competition Bureau of Canada (June 14, 2008) and Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies (November 14, 2005).

## 1.1 Calculation of Base Fine

The fining process in the United States is governed by the application of the *U.S. Sentencing Guidelines* that provide a consistent structure for calculating fines. The U.S. courts consider the Guidelines to be advisory, not mandatory, and allow for judicial discretion.<sup>2</sup>

With the adoption of the U.S. Sentencing Guidelines for antitrust offenses in 1991, a formula was established to calculate corporate fines. Much like the proposal in the draft Notice where a percentage of sales is the primary factor in establishing the fine, the U.S. system relies heavily on the volume of commerce affected by the violation. The calculation of the fine under the U.S. Sentencing Guidelines begins with the determination of a "base" fine. The U.S. volume of commerce is measured as the amount of goods or services sold by the corporation that are affected by the violation over the entire length of the violation. This amount will be different from the "total sales" standard in the Draft Notice which will in principle be limited to sales in the last year of the illegal conduct.<sup>3</sup> If the violation continued over many years, the U.S. commerce number can be much higher.

From their inception in 1991, the Guidelines established 20% of the volume of commerce as an appropriate proxy for actual overcharge because the determination of an overcharge or harm is very difficult to establish through evidence. The use of this irrebutable proxy has been subject to serious criticism in the United States. Empirical studies have found significant variation in the minimum, maximum, median, mean, and range of cartel overcharges.<sup>4</sup> Accordingly, any proxy or set presumption is likely to be a poor estimate of the actual economic harm in any given case.

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<sup>2</sup> In *United States v. Booker*, 125 S.Ct 738 (2005), the Supreme Court held that the Sentencing Guidelines are no longer mandatory, but stated that "[the Federal Sentencing Act] requires a sentencing court to consider Guidelines ranges. . . but it permits the court to tailor the sentence in light of other statutory concerns as well, see [18 U.S.C.] 3553(a)." The Court also stated, "Those factors [3553(a)] in turn will guide appellate courts, as they have in the past, in determining if a sentence is unreasonable." The advisory status of the Guidelines under *Booker* amplifies the need for the Sentencing Commission to offer empirical support for its recommendations and methodology so that courts will have a sufficient understanding of the premises of the Guidelines to exercise their sound sentencing discretion and impose reasonable sentences.

<sup>3</sup> "Affected" v. "total" sales may also create a difference in this calculation.

<sup>4</sup> See, e.g., Margaret C. Levenstein & Valerie Y. Suslow, "What Determines Cartel Success," 44 *J. Econ. Lit.* 43, 80 (2002) (looking at over twenty cartels that inflated prices 0 percent to 100 percent, with a median, and mean, overcharge of nearly 45 percent); Jonathan B. Baker, "The Case for Antitrust Enforcement," 17 *J. Econ. Persp.* 27, 28-29 (2003) (citing studies showing cartel overcharges from 6.5 percent to 32.5 percent); Richard A. Posner, *ANTITRUST LAW*, 303-04 (2d ed. 2001) (twelve cartels with a median overcharge of nearly 40 percent and a mean of 50 percent); John M. Connor & Robert H. Lande, "How High do Cartels Raise Prices: Implications for Optimal Cartel Fines," 80 *Tulane L. Rev.* 513 (2005) (over two dozen cartels with a median overcharge of about 25 percent and a mean overcharge of about 40 percent); John M. Connor, "Price-Fixing Overcharges: Legal and Economic Evidence," Purdue U. Working Paper (Jan. 10, 2005) (very large sample set, finding median overcharges of 18 to 32 percent and a mean of 49 percent); John M. Connor, "Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement," Purdue U., Dept. of Ag. Econ., Staff Paper 03-12 (2003) (seventy cartels raised prices 4 to 100 percent, with a mean of 28 percent); OECD, Report on the Nature and Impact of Hard-Core Cartels and Sanctions Against Cartels under National Competition Laws, Annex A (2003) (median overcharges of 33 percent); Gregory J. Werden, "The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Whinston Overlook" (U.S. Dep't of Justice Antitrust Division, Discussion Paper, No. EAG 03-2 (Jan. 2003) (finding overcharges with a mean of 21 percent and a median of 18 percent in over a dozen cartels); and Mark A. Cohen & David T. Scheffman, "The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?," 27 *Am. Crim. L. Rev.* 331 (1989) (an older study finding a median overcharge of about 8 to 14 percent, and a mean of 8 to 10 percent).

Once the base fine is established, the culpability score of the corporation is calculated based on several aggravating factors: the size of the organization; whether high level employees participated in the violation; whether the company is a recidivist; and whether it obstructed the investigation; and mitigating factors: an effective compliance program; reporting the violation; and cooperating with the investigation. With the calculation of the culpability score, the Guidelines assign multipliers by which the base fine is multiplied, creating a range from within which the Court may assess a fine.

## **1.2 *Aggravating and Mitigating Factors***

The aggravating and mitigating factors set out in the *U.S. Sentencing Guidelines* are used to differentiate penalties based on the defendant's activities. The U.S. Sentencing Guidelines assign offense level "points" to categories in aggravation or mitigation. The U.S. system is very specific in assigning points for bid rigging, volume of commerce, role in the offense, obstruction of justice, and acceptance of responsibility, and, as such, it creates some parameters that allow a certain degree of transparency and proportionality, as well as less subjectivity. These elements tend to differentiate fine levels in the U.S., especially for those companies that are smaller, less culpable and cooperative.

## **1.3 *The Economy --Ability to Pay Considerations***

Looking at the current state of the economy worldwide, the issue of ability to pay a fine is a common problem in U.S. fine determinations. The U.S. Sentencing Guidelines provide for ability to pay determinations, but, most importantly, the Antitrust Division of the U.S. Department of Justice regularly undertakes an extensive financial review of companies with more limited financial resources and has often lowered the fine or made alternative arrangements for payment based on financial condition. This type of system of rigorous, good faith review of financial conditions is a key element to the success of any enforcement agency seeking significant penalties in times of economic peril.

## **2. VALUE OF SALES AND DURATION**

### **2.1 *Percentage of Value of Sales***

The draft Notice proposes that the percentage of value of sales to be taken into account in setting the fine for an infringement of competition law should range between 0 and 30% of value of sales. In addition, the draft Notice proposes that the most serious forms of infringement (typically cartels) should be subject to a fine based on 15 – 30% of value of sales. This puts the Competition Authority's proposal in line with the Commission's Guidelines on Fines,<sup>5</sup> which were adopted in 2006 (i.e. before the economic crisis of 2008).

However, it is respectfully suggested that automatically implementing a fine between 15 and 30% of the value of sales for serious infringements of competition law is not proportionate. It is also noticeable that the Commission usually limits its fines to between 15 and 20% of the value of sales (so far as is known from its decisions in the public domain):

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<sup>5</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the "Commission's Guidelines on Fines").

<b>Commission Decisions</b>	<b>% Value of Sales</b>
<i>Heat Stabilisers</i> - in the tin stabilisers market <sup>6</sup>	20%
<i>Heat Stabilisers</i> - in the EBS/esters market <sup>7</sup> <i>Sodium Chlorate</i> <sup>8</sup>	19%
<i>Flat Glass</i> <sup>9</sup> <i>Professional Videotape</i> <sup>10</sup>	18%
<i>International Removal Services</i> <sup>11</sup> <i>Calcium Carbide</i> <sup>12</sup>	17%
<i>Car Glass</i> <sup>13</sup> <i>Power Transformers</i> <sup>14</sup> <i>Nitrile Butadiene Rubber</i> <sup>15</sup>	16%
<i>Gas</i> <sup>16</sup> <i>Bananas</i> <sup>17</sup>	15%

In *Marine Hoses* the Commission applied an exceptionally high coefficient of 25% of value of sales in view of the particular seriousness of the infringement.<sup>18</sup>

Notwithstanding the fact that most fines imposed by the Commission are between 15 and 20%, companies that are the subject of a cartel investigation must plan for a possible fine of 30% of the value of sales. This places severe financial pressure upon companies in terms of liquidity, access to funding for investment, and corporate restructuring (in particular merger discussions).

<sup>6</sup> Case 38859, *Heat Stabilisers*, Prohibition decision of 11 November 2009, paragraphs 708 and 709 (“Heat Stabilisers”).

<sup>7</sup> *Heat Stabilisers*, paragraphs 708 and 709.

<sup>8</sup> Case 38695, *Sodium Chlorate*, Prohibition decision of 11 June 2008, paragraph 523 (“Sodium Chlorate”).

<sup>9</sup> Case 39165, *Flat Glass*, Prohibition decision of 28 November 2007, paragraph 482 (“Flat Glass”).

<sup>10</sup> Case 38432, *Professional Videotape*, Prohibition decision of 20 November 2007, paragraph 215 (“Professional Videotape”).

<sup>11</sup> Case 38543, *International Removal Services*, Prohibition decision of 14 March 2008, paragraph 543 (“International Removal Services”).

<sup>12</sup> Case 39396, *Calcium Carbide*, Prohibition decision of 22 July 2009, paragraph 301 (“Calcium Carbide”).

<sup>13</sup> Case 39125, *Car Glass*, Prohibition decision of 12 November 2008, paragraph 678 (“Car Glass”).

<sup>14</sup> Case 39129, *Power Transformers*, Prohibition decision of 7 October 2009, paragraph 247 (“Power Transformers”).

<sup>15</sup> Case 38628, *Nitrile Butadiene Rubber*, Prohibition decision of 23 October 2008, paragraph 175 (“Nitrile Butadiene Rubber”).

<sup>16</sup> Case 39401 *Gas*, Prohibition decision of 8 July 2009, paragraph 365 (“Gas”).

<sup>17</sup> Case 39188, *Bananas*, Prohibition decision of 15 October 2008, paragraph 460 (“Bananas”).

<sup>18</sup> Case 39406, *Marine Hoses*, Prohibition decision of 28 January 2009, paragraph 445 (“Marine Hoses”).

It is suggested that the Competition Authority limit the application of fines to 15 – 20% for very serious infringements, as this provides sufficient basis for a proportionate and dissuasive fine.<sup>19</sup>

In the alternative, it is respectfully suggested that the Notice clarify that while a range of 15 – 30% may be applied, that fines above 20% of the value of sales are exceptional and shall be applied only in the most serious cases. A non-exhaustive list of factors for determining such cases could be provided (e.g., a cartel that involves a high proportion of the relevant market in France). Such clarification would put the Competition Authority's fining policy in line with the Commission's practice.

## **2.2 Turnover from Previous Financial Year**

The draft Notice provides that the fine shall be based upon the turnover of the company (as a group) in the last financial year of the infringement unless this is not considered to be representative.<sup>20</sup> This method is a welcome clarification as it means that companies are not fined for the sales they generate in a competitive environment once the anti-competitive infringement has terminated. It is respectfully suggested, however, that closer regard be given to the average turnover over the duration of the infringement rather than making this an exceptional consideration in the assessment of the fine.

## **2.3 Single Product Companies**

The proposed fining system penalizes companies that specialize in the product at issue in the cartel investigation because the value of sales for calculating the fine will form a much higher proportion of the fine than a company with a suite of products. The cap of 10% of annual turnover is not sufficient to protect companies as they remain penalized to a much higher extent than other participants in the cartel that have a broader portfolio. The Sections suggest that the Competition Authority reconsider the fining structure to ensure that such companies are not penalized in a disproportionate manner, as already supported by the Paris Court of Appeal in the “Steel” case.<sup>21</sup>

## **2.4 Turnover of Group and not just infringing company**

The draft Notice seems to indicate (at paragraphs 3 and 5) that the relevant turnover to be taken into account will be that of the group to which the undertaking belongs, based on Article L.464-2, I, third indent of the FCC. Even though the draft Notice does not explicitly address the issue of parent-subsidiary liability, it is respectfully submitted that the turnover of the group should be taken into account only if the facts establish that the parent company should be liable for wrongful acts of its subsidiary. By comparison, the antitrust authorities in the United States take the approach that corporate responsibility shall be borne only by those entities (including parent corporations) found to have committed or supported the antitrust violation at issue and calculate a base fine from only the volume of commerce affected by the violation.

The ECJ ruled, in the *Akzo Nobel* case,<sup>22</sup> that a parent company could be automatically presumed liable for infringements committed by its wholly-owned subsidiary, and that this presumption could be rebutted by the parent company. However, Advocate General Bot<sup>23</sup> recently argued that this

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<sup>19</sup> This would be in keeping with the recommendations of the Folz Report. Folz-Schaub-Raysseguier, “Rapport sur l’appréciation de la sanction en matière de pratiques anticoncurrentielles” (the “Folz Report”).

<sup>20</sup> Paragraph 31 of the draft Notice.

<sup>21</sup> Paris Court of Appeal, 19 January 2010, *AMD Sud-Ouest e.a.*, 2009/00334. The Court of Appeal overruled the Authority for not taking into account the proportion of the relevant sales as compared to the overall turnover of the undertakings (pp. 36-37 of the ruling).

<sup>22</sup> Case C-97/08 P, *Akzo Nobel e.a. v Commission*, ECR I-8237, paragraphs 61–64.

<sup>23</sup> Opinion of AG Bot, 26 October 2010, Case C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg*, not yet reported, paragraphs 206 *et seq.*

approach was inconsistent with the presumption of innocence, because the presumption is *de facto* irrefutable, which runs contrary to the ECHR. The European Parliament shares this view.<sup>24</sup>

In addition, the French courts and the Competition Authority traditionally consider, based on company law, that the parent company will be liable only if the subsidiary was not autonomous on the market, was unable to determine its own commercial, financial or technical policy, and was unable to free itself from the parent company's hierarchical control.<sup>25</sup> The Competition Authority's recent decision<sup>26</sup> indicating that the *Akzo Nobel* presumption could be applied under French law must be read against this background of uncertainty and has not yet been tested before the Paris Court of Appeal.

Should the draft Notice confirm the application of a *de facto* irrefutable presumption, it would amount to punishing the same undertaking twice -- first, by taking into account the parent company's turnover on the basis of an automatic presumption, and second by aggravating the fine because the undertaking belongs to a group (see paragraph 42 of the draft Notice).

## **2.5 Duration**

The draft Notice states that the fine shall be increased by 50% for each year of the infringement. The Sections note that there may be a certain arbitrariness to increasing the magnitude of the fine based simply on annual increments.

In the United States, the duration of the cartel affects the amount of the fine through the calculation of the volume of commerce affected, which in turn is the basis upon which the fine is set. The calculation of the fine under the U.S. Sentencing Guidelines begins with the determination of a "base" fine, 20% of affected volume of commerce. That volume of commerce is measured as the amount of goods or services sold by the corporation that are affected by the violation, i.e., the total volume of goods and services sold during the entire course of the cartel. In this way, duration of the cartel alone (which may or may not have any bearing on its perniciousness) is not, in and of itself, a factor in sentencing.

The Sections therefore respectfully suggest that duration should not be considered as an independent factor in the calculation of fines.

## **3. HARM TO THE ECONOMY**

The percentage of value of sales proposed in the draft Notice employs a proxy calculation because it is difficult to quantify and establish the actual economic harm resulting from cartel behavior. Although the methodology used by the draft Notice is similar to that used by the US Sentencing Guidelines, the calculation of the harm to the economy is, in the Draft Notice, only one of the elements used to calculate the base fine. The inclusion of the harm to the economy as a consideration in the calculation of fines in France has the potential to enhance the fairness and proportionality of fines in cases where the degree of harm is found to be low or unreliable in view of the evidence provided or found to be the opposite. The Sections offer three comments regarding the assessment of harm to the economy.

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<sup>24</sup> European Parliament Resolution of 9 March 2010 on the Report on Competition Policy 2008 (2009/2173(INI)), paragraph 50: “[the Parliament] calls on the Commission to define specific criteria pursuant to which parent companies should be made jointly and severally liable for cartel-like behaviour on the part of their subsidiaries.”

<sup>25</sup> See, e.g., Decision 09-D-36, 9 December 2009, *Services de communications électroniques dans les départements de la Martinique, de la Guadeloupe et de la Guyane*, paragraphs 408 et seq., upheld by the Paris Court of Appeal in a ruling dated 23 September 2010, *Digicel e.a.*, n°2010/00163.

<sup>26</sup> Decision 11-D-02, 26 January 2011, *Restauration des monuments historiques*, paragraphs 597 et seq.

First, although case law often refers to the seriousness of a practice and the harm to the economy as one block,<sup>27</sup> as a matter of law both criteria should be dealt with separately. It is respectfully suggested that the draft Notice should clearly indicate that these are distinct criteria that will be addressed separately in the future, especially in light of (i) the Court de Cassation’s ruling that harm to the economy may not be presumed,<sup>28</sup> and (ii) the fact that some of the criteria listed under §22 regarding seriousness look similar to some of the criteria listed under §26 regarding harm to the economy.

Second, the draft Notice lists a number of factors relevant to the assessment of harm to the economy (paragraph 26 of the draft Notice). While the drafting of such list is to be welcomed as promoting greater transparency, the Sections note other factors taken into account by French courts, and recommend that the following factors also be mentioned in the draft Notice:

- Restricting access to a profession, e.g. taxi drivers:<sup>29</sup> this should be mentioned under both “*conséquences conjoncturelles*” and “*conséquences structurelles*”;
- Mitigating the harm to the economy on account of the strong bargaining power of the buyer, which was used against sellers engaged in collusive actions to force them to reduce their prices;<sup>30</sup>
- Mitigating the harm to the economy on account of an “undisciplined” application of the collusive practice by the undertakings;<sup>31</sup>
- Aggravation of the harm to the economy where clients are vulnerable and captive.<sup>32</sup>

Third, the draft Notice indicates (at paragraph 26 third indent) that price margins may be taken into account, as has been the case in past decisions of the Competition Authority.<sup>33</sup> It is respectfully suggested that it is not possible for the Competition Authority to give an indication of what the “appropriate” margin should be in a specific sector or for a specific company. Margin level will depend on a variety of that have nothing to do with the competition law infringement. Consequently, it is suggested that the margin to be taken into account would have to be determined on a case-by-case basis.

While the Sections understand that no exhaustive list can be drafted, we recommend that the Authority: (i) indicate if it intends to prioritize certain factors over others, and (ii) clarify the most important (in its own view) of these elements, especially as certain elements may belong to more than one category. Otherwise, it will be difficult to assess the harm to the economy, especially for foreign companies, because this concept is specific to French law and has no equivalent in other legal systems. It is also important that the Competition Authority provide evidence and give reasons on how much the

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<sup>27</sup> See, e.g., Decision 08-D-12, 21 Mai 2008, *Secteur de la production du contreplaqué*, paragraphs 225 *et seq.* ; Decision 07-D-48, 18 December 2007, *Déménagement national et international*, paragraphs 242 *et seq.* ; Decision 06-D-13, 6 June 2006, *Marché public de travaux pour la reconstruction du stade Armand Cesari à Furiani*, paragraphs 66 *et seq.*

<sup>28</sup> French Court of Cassation, Commercial chamber, 7 April 2010, bulletin n°430.

<sup>29</sup> Decision n°10-D-15, 11 May 2010, *GIE Groupement des Taxis amiénois et de la métropole*, paragraph 214.

<sup>30</sup> Decision n°10-D-35, 15 December 2010, *Fourniture d’électrodes de soudure pour les constructeurs automobiles*, paragraphs 269-270 ; decision n°09-D-25, 29 July 2009, *Entreprises spécialisées dans les travaux de voies ferrées*, paragraph 289.

<sup>31</sup> Decision n°06-D-09, 11 April 2006, *Fabrication des portes*, paragraph 428.

<sup>32</sup> Decision n°09-D-19, 10 June 2009, *Déménagement des personnels militaires relevant du CTAC de l’armée de terre à Nancy*, paragraph 214; decision n°07-D-50, 20 December 2007, *Distribution de jouets*, paragraph 736; decision n° 03-D-45, 25 September 2003, *Calculatrices solaires*, paragraph 511.

<sup>33</sup> Decision n°07-D-50, 20 December 2007, *Distribution de jouets*, paragraphs 744-749.

violations have harmed the economy and the precise impact this has had on the fine in order to ensure compliance with the law and to assist the courts with their review.

#### **4. AGGRAVATING FACTORS**

##### **4.1 *Notoriety***

According to the draft Notice, a company found to have infringed the competition rules may receive a higher fine if it is in a position of notoriety, influence, or authority such as to have an exemplary role for the sector concerned. This factor would require the Competition Authority to make a subjective analysis of the perceived position of the company concerned. However, it typically will be very difficult to determine whether a company's behavior in participating in an infringement had an influential effect upon others simply due to its alleged "notoriety" or "authority" (at least in the absence of effective retaliatory measures or threats). In addition, it could be discriminatory to take the "notoriety" or "authority" of a company into account as it would result in companies being treated differently in spite of being subject to similar conditions. Most pertinently, there does not appear to be legal authority under the FCC for such an approach. For these reasons, it is respectfully suggested that this subjective factor should not be taken into account as an aggravating factor for increasing the fine.

The Sections note that the U.S. Sentencing Guidelines do not take into account subjective factors such as "notoriety." As noted above, under the U.S. Sentencing Guidelines, once a base fine is established (20% of sales affected by the violation), a culpability score of the corporation is calculated based on several aggravating factors: the size of the organization; whether high level employees participated in the violation; whether the company is a recidivist; and whether it obstructed the investigation; and mitigating factors: reporting the violation and cooperating with the investigation. These factors, whether aggravating or mitigating, must be established in each case.

##### **4.2 *Economic Strength***

While not formally included in the list of aggravating circumstances, other factors of "individualisation" of the fine are described in paragraph 42 of the draft Notice that may lead to an increase of the fine: the "economic strength" of the company; the fact that the company belongs to an international group; the size of the company's product portfolio; the importance of the company's financial resources; and the fact that the company is focused on the sector concerned by the infringement. It is unclear from the draft Notice how these factors will be considered.

While the importance of the total sales and financial resources of the infringer may be relevant to assess whether a given fine would have an adequate deterrent effect, it is not apparent why and how the size of the product portfolio or the simple fact of belonging to an international group of companies rather than a national company should be taken into consideration for the setting of fines. The Sections respectfully recommend that this consideration be removed from the assessment of fines as it creates a risk of discrimination and gives rise to similar concerns as the issue of parent liability (discussed above). It is suggested that it would instead be better to provide that the fact that a company is a small and medium sized enterprise may be a mitigating factor.

By comparison, under the U.S. Sentencing Guidelines the fact that the company belongs to an international group, the size of the company's product portfolio, the importance of the company's financial resources, and the fact that the company is focused on the sector concerned by the infringement are not factors in determining the appropriate criminal fine. The overall "economic strength" of a company is considered if it is determined that the appropriate guidelines fine exceeds what the company can afford to pay over time without seriously jeopardizing its continued viability. In those cases the Guidelines call for a reduction of the fine to the level that will not jeopardize the company's continued viability. Also, removing a competitor from the marketplace could adversely affect competition, and fining policies should not undermine overarching goals of competition law.

## 5. MITIGATING FACTORS

The draft Notice lists only three examples of mitigating circumstances: (i) effective competitive / maverick behaviour; (ii) constraint to participate in the infringement; and (iii) infringement behaviour authorized or encouraged by government or administrative authorities.

### 5.1 *Burden of Proof*

The draft Notice states that defendants must demonstrate that the conditions for invoking mitigating circumstances are met.<sup>34</sup> This places the burden of proof upon the defendant parties. However, the Sections strongly recommend that the Competition Authority should take into account all factual elements of the file at its disposal, including mitigating circumstances, when setting the level of the fines.

### 5.2 *Non-Exhaustive List of Mitigating Factors*

In practice, it is very difficult to assess or prove what may constitute a mitigating circumstance in the absence of clear rules. It is respectfully suggested that the Competition Authority provide a more complete list, in particular by drawing from its experience in past cases. The Sections suggest that the following factors should be considered as mitigating factors:

- (i) The cooperation of the infringers and discontinuation of the infringement after it has been brought to the attention of its management

The list of mitigating circumstances in the Commission's Guidelines on Fines includes the fact that "the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its obligation to do so." This rewards a company subject to a competition investigation that has not participated in the leniency program (perhaps for procedural reasons) but has nonetheless co-operated in good faith with the authorities in order to bring the infringement to an end and assist the prosecution of wrongdoers. Such cooperative conduct should be rewarded and encouraged. It is respectfully suggested that the Competition Authority specify that cooperative conduct will be considered as a mitigating factor in the assessment of the fine.

- (ii) Good faith in a context of complex legislation

The list of mitigating circumstances in the Commission's Guidelines includes the fact that "the infringement has been committed as a result of negligence." This factor recognizes that antitrust laws are complex and their interpretation may vary over time and from one enforcement authority to the other. Companies, in particular non-French companies, may infringe French antitrust laws by negligence or even in the good faith belief that they are not violating the law. Taking into account such circumstances can be justified in cases where the applicable legal principles are not obvious, where the facts of the case are extraordinary, or in the absence of legal precedents. The Competition Authority has applied this principle in the past<sup>35</sup> and it is recommended that it should specify in its Notice that it will continue to do so.

- (iii) Antitrust Compliance Programs

The Sections recommend the inclusion of a compliance program as a possible mitigating factor. Compliance programs are the first line of defense to prevent antitrust offenses and the corresponding harm to consumers. The efforts made by a company to prevent antitrust offenses should be encouraged

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<sup>34</sup> At least as concerns the two first examples of mitigating circumstances (effective competitive / maverick behaviour and constraint to participate in the infringement).

<sup>35</sup> See e.g., Decision n°06-D-25 of July 28, 2006; Decision n°05-D-63 of November 17, 2005; and Decision n°04-D-48 du of October 14, 2004.

and not disregarded, in particular where the conduct in issue involved “rogue employees” who have infringed internal compliance rules.

Competition authorities in other countries have recognized that compliance programs can be a mitigating factor in appropriate circumstances, i.e. where the existence of compliance measures implemented in good faith can be supported by evidence. As one example, the Canadian Competition Bureau states in its *Corporate Compliance Programs Bulletin* (2010) that the Commissioner of Competition “may give weight to the pre-existence of a credible and effective program in making sentencing recommendations” and that establishing or strengthening a compliance program in response to an offense “can also have a positive impact on the Commissioner’s sentencing recommendations or on the remedy sought by the Commissioner.”<sup>36</sup> It is suggested that the Notice contain a similar provision.

### **5.3 Recidivism**

The Competition Authority proposes that recidivism be considered as an aggravating factor (with an uplift of between 5 and 50% for each past infringement). The Sections believe that it is appropriate to include recidivism as an aggravating factor. However, the review period of 20 years may be excessive and result in inequity. The Sections understand that the standard period of limitation in France is 5 years. By having a period of 20 years, effectively one generation in a company is being penalized for an infringement committed by a previous generation often with an entirely different management and work force. It can also hinder corporate mergers, as companies may be reluctant to merge with companies carrying historic fines. It is respectfully suggested that a shorter limitation period that could be rebuttable depending upon corporate circumstances would satisfy the public policy objective of preventing repeat offenses without being disproportionate.

### **5.4 Inability to pay / Economic Crisis**

The draft Notice indicates (at paragraphs 54-57) that companies that have established that they are unable to pay may, upon request, have their fine reduced. The Authority thereby follows the approach taken in the European Commission’s Guidelines on Fines, and such coherence is welcome. It is suggested that particular regard should be had to the findings of the Paris Court of Appeal in the Steel case on how this factor could be taken into account in setting fines.<sup>37</sup>

## **CONCLUSIONS**

The Sections respectfully submit that in preparing the procedural aspects of the fines that the Competition Authority raises the issue with alleged infringers at an early stage in the investigation so that many of the issues raised in these observations can be discussed fully.

The Competition Authority is to be commended for carrying out this consultation and the Sections hope that these observations will assist the Competition Authority in finalizing the Notice.

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<sup>36</sup> Competition Bureau of Canada, *Corporate Compliance Programs* (27 September 2010) at p. 14.

<sup>37</sup> Paris Court of Appeal, 19 January 2010, *AMD Sud-Ouest e.a.*, 2009/00334.

## **ANNEX - EXTRACT OF L.464-2 OF FRENCH COMMERCIAL CODE**

### **Article L464-2**

(Act No. 2001-420 of 15 May 2001 Art. 73 Official Journal of 16 May 2001)

(Order No. 2004-1173 of 4 November 2004 Art. 10 Official Journal of 5 November 2004)

I. - The Competition Council may order the companies or bodies concerned to cease their non-competitive practices within a specified period or may impose special conditions. It may also accept commitments from them to discontinue the non-competitive practices.

It may impose a financial penalty applicable either immediately or in the event of non-compliance with the conditions imposed or the commitments accepted.

The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or company penalized or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited by the present Part. They are individually determined for each company or body penalized, with reasons given for each penalty.

If the offender is not a company, the maximum amount of the penalty is 3 million Euros. The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company.

The Competition Council may order that its decision, or an abstract thereof, be posted on the court notice-board in the manner which it stipulates. It may also order that the decision, or the abstract thereof, be inserted in the report on the activities for the financial year drawn up by the company's executives, board of directors or executive board. The costs are borne by the party concerned.

II. - The Competition Council may impose coercive fines on the parties concerned of not more than 5% of the average daily turnover, per day of delay, with effect from the date it determines, to compel them to:

a) Comply with a decision which enjoined them to cease the non-competitive practices or imposed special conditions, or to implement a decision making a commitment compulsory by virtue of I;

b) Implement the measures imposed pursuant to Article L. 464-1.

The turnover taken into account is calculated on the basis of the company's accounts for the last financial year ended as of the date of the decision. The amount of the coercive fine is definitively set by the Competition Council.

III. - When a body or a company does not contest the truth of the allegations made against it and undertakes to alter its conduct in the future, the general rapporteur may recommend that the Competition Council, which hears the parties and the government representative without a report being drawn up in advance, impose the financial penalty referred to in I and take into account the fact that no challenge was raised. In such cases, the maximum amount of the penalty incurred is reduced by half.

IV. - A total or partial exemption from financial penalties may be granted to a company or a body which, along with others, has implemented a practice prohibited by the provisions of Article L. 420-1, if it has helped to establish the existence of the prohibited practice and to identify its perpetrators

by providing information which the council or the administration did not have access to beforehand. To that end, subsequent to the initiative taken by that company or body, the Competition Council, at the request of the general rapporteur or the Minister for Economic Affairs, adopts a plea for leniency which stipulates the conditions the envisaged exemption is subject to after the government representative and the company or body concerned have submitted their observations; the decision is conveyed to the company or the body and the minister, and is not published. When a decision is taken pursuant to I of the present article, the council may, if the conditions stipulated in the plea for leniency have been complied with, grant an exemption from the financial penalties proportionate to the contribution made to proving the existence of the offense.